

1 EDMUND G. BROWN JR.
Attorney General of California
2 ALFREDO TERRAZAS
Senior Assistant Attorney General
3 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
4 State Bar No. 101336
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-3037
7 Facsimile: (619) 645-2061
Attorneys for Complainant

8
9 **BEFORE THE**
BOARD OF REGISTERED NURSING
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 2011-534

12 **KIRSTEN LEE GAGLIARDO**
13 **aka KIRSTEN LEE LUNNEBERG**
14 **10859 Caminito Colorado**
San Diego, CA 92131

A C C U S A T I O N

15 **Registered Nurse License No. 444561**

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 1. Louise R. Bailey, M.Ed., RN (Complainant) brings this Accusation solely in her
21 official capacity as the Executive Officer of the Board of Registered Nursing, Department of
22 Consumer Affairs.

23 2. On or about August 31, 1989, the Board of Registered Nursing issued Registered
24 Nurse License Number 444561 to Kirsten Lee Gagliardo, aka Kirsten Lee Lunneberg
25 (Respondent). The Registered Nurse License was in full force and effect at all times relevant to
26 the charges brought herein and will expire on April 30, 2011, unless renewed.

27 ///

28 ///

JURISDICTION

3. This Accusation is brought before the Board of Registered Nursing (Board), Department of Consumer Affairs, under the authority of the following laws: All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2750 of the Business and Professions Code ("Code") provides, in pertinent part, that the Board may discipline any licensee, including a licensee holding a temporary or an inactive license, for any reason provided in Article 3 (commencing with section 2750) of the Nursing Practice Act.

5. Section 2764 of the Code provides, in pertinent part, that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary proceeding against the licensee or to render a decision imposing discipline on the license.

6. Section 2811 states:

....

(b) Each such license not renewed in accordance with this section shall expire but may within a period of eight years thereafter be reinstated upon payment of the biennial renewal fee and penalty fee required by this chapter and upon submission of such proof of the applicant's qualifications as may be required by the board, except that during such eight-year period no examination shall be required as a condition for the reinstatement of any such expired license which has lapsed solely by reason of nonpayment of the renewal fee. After the expiration of such eight-year period, the board may require as a condition of reinstatement that the applicant pass such examination as it deems necessary to determine his present fitness to resume the practice of professional nursing.

....

STATUTORY PROVISIONS

7. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

....

(b) Considering suspension or revocation of a license under Section 490. Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

///

///

1 8. Section 490 of the Code states:

2 (a) In addition to any other action that a board is permitted to take against a
3 licensee, a board may suspend or revoke a license on the ground that the licensee has
4 been convicted of a crime, if the crime is substantially related to the qualifications,
5 functions, or duties of the business or profession for which the license was issued.

6 (b) Notwithstanding any other provision of law, a board may exercise any
7 authority to discipline a licensee for conviction of a crime that is independent of the
8 authority granted under subdivision (a) only if the crime is substantially related to the
9 qualifications, functions, or duties of the business or profession for which the
10 licensee's license was issued.

11 (c) A conviction within the meaning of this section means a plea or verdict of
12 guilty of a conviction following a plea of nolo contendere. Any action that a board is
13 permitted to take following the establishment of a conviction may be taken when the
14 time for appeal has elapsed, or the judgment of conviction has been affirmed on
15 appeal, or when an order granting probation is made suspending the imposition of
16 sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of
17 the Penal Code.

18 (d) The Legislature hereby finds and declares that the application of this
19 section has been made unclear by the holding in *Petropoulos v. Department of Real*
20 *Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a
21 significant number of statutes and regulations in question, resulting in potential harm
22 to the consumers of California from licensees who have been convicted of crimes.
23 Therefore, the Legislature finds and declares that this section establishes an
24 independent basis for a board to impose discipline upon a licensee, and that the
25 amendments to this section made by Senate Bill 797 of the 2007-2008 Regular
26 Session do not constitute a change to, but rather are declaratory of, existing law.

27 9. Section 492 of the Code states, in pertinent part:

28 Notwithstanding any other provision of law, successful completion of any
diversion program under the Penal Code, or successful completion of an alcohol or
drug problem assessment program . . . shall not prohibit any agency . . . from
taking disciplinary action against a licensee or from denying a license for professional
misconduct, notwithstanding that evidence of that misconduct may be recorded
pertaining to an arrest.

.....

10. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a
board within the department pursuant to law to deny an application for a license or to
suspend or revoke a license or otherwise take disciplinary action against a person who
holds a license, upon the ground that the applicant or the licensee has been convicted
of a crime substantially related to the qualifications, functions, and duties of the
licensee in question, the record of conviction of the crime shall be conclusive
evidence of the fact that the conviction occurred, but only of that fact, and the board
may inquire into the circumstances surrounding the commission of the crime in order
to fix the degree of discipline or to determine if the conviction is substantially related
to the qualifications, functions, and duties of the licensee in question.

As used in this section, "license" includes "certificate," "permit," "authority," and "registration."

11. Section 2761 of the Code states:

The board may take disciplinary action against a certified or licensed nurse or deny an application for a certificate or license for any of the following:

(a) Unprofessional conduct, which includes, but is not limited to, the following:

....

(f) Conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of a registered nurse, in which event the record of the conviction shall be conclusive evidence thereof.

12. Section 2762 of the Code states:

....

(b) Use of a controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug or dangerous device as defined in Section 4022, or alcoholic beverages, to an extent or in a manner dangerous or injurious to himself or herself, any other person, or the public or to the extent that such use impairs his or her ability to conduct with safety to the public the practice authorized by his or her license.

(c) Be convicted of a criminal offense involving the prescription, consumption, or self-administration of any of the substances described in subdivisions (a) and (b) of this section, or the possession of, or falsification of a record pertaining to, the substances described in subdivision (a) of this section, in which event the record of conviction is conclusive evidence thereof.

....

12. California Code of Regulations, title 16, section 1444, states:

A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare. Such convictions or acts shall include but not be limited to the following:

(a) Assaultive or abusive conduct including, but not limited to, those violations listed in subdivision (d) of Penal Code Section 11160.

(b) Failure to comply with any mandatory reporting requirements.

(c) Theft, dishonesty, fraud, or deceit.

(d) Any conviction or act subject to an order of registration pursuant to Section 290 of the Penal Code.

///

1 13. California Code of Regulations, title 16, section 1445, states:

2
3 (b) When considering the suspension or revocation of a license on the grounds
4 that a registered nurse has been convicted of a crime, the board, in evaluating the
5 rehabilitation of such person and his/her eligibility for a license will consider the
6 following criteria:

7 (1) Nature and severity of the act(s) or offense(s).

8 (2) Total criminal record.

9 (3) The time that has elapsed since commission of the act(s) or offense(s).

10 (4) Whether the licensee has complied with any terms of parole, probation,
11 restitution or any other sanctions lawfully imposed against the licensee.

12 (5) If applicable, evidence of expungement proceedings pursuant to Section
13 1203.4 of the Penal Code.

14 (6) Evidence, if any, of rehabilitation submitted by the licensee.

15 **COST RECOVERY**

16 14. Section 125.3 of the Code provides, in pertinent part, that the
17 Board/Registrar/Director may request the administrative law judge to direct a licensee found to
18 have committed a violation or violations of the licensing act to pay a sum not to exceed the
19 reasonable costs of the investigation and enforcement of the case.

20 **FIRST CAUSE FOR DISCIPLINE**

21 **(October 24, 2008 Criminal Conviction for Driving With Blood Alcohol Level of 0.08% or**
22 **More on September 12, 2008)**

23 15. Respondent is subject to disciplinary action under Code sections 490 and 2761,
24 subdivision (f), in that Respondent was convicted of a crime that is substantially related to the
25 qualifications, functions, and duties of a registered nurse. The circumstances are as follows:

26 16. On or about October 24, 2008, in the Superior Court of California, County of San
27 Diego, Case No. M-061038, in the case entitled *People vs. Kirsten Lee Gagliardo*, Respondent
28 was convicted, on her plea of nolo contendere, of violating Vehicle Code section 23152(b)
(driving with a blood alcohol level of 0.08% or more), a misdemeanor.

17. The facts that led to the conviction are that on or about September 12, 2008, San Diego Police Department officers were dispatched to Thurgood Marshall Middle School in San Diego, California, reference a traffic collision involving alcohol. Upon arrival, officers made contact with Respondent in the school parking lot. Officers asked Respondent where she was going, and Respondent told officers that she was there to pick up her daughter. Officers observed that Respondent's eyes were glassy and smelled an odor of an alcoholic beverage. Officers learned that Respondent had backed her vehicle into the vehicle belonging to CC, and that when CC got out of her vehicle and approached Respondent's vehicle to obtain driver's license and insurance information, CC observed Respondent fumbling for these items. CC smelled an odor of alcohol on Respondent's breath, and then asked the principal to call the police. Respondent failed the field sobriety tests and was arrested and transported to the station. Once at the station, Respondent submitted to a breath test and the results came back at 0.20% BAC.

18. As a result of the conviction, Respondent was placed on five years summary probation, ordered to serve three days in the Public Service Program, enroll and complete a 9-month First Conviction Program which included MADD, STAR, and an eight-hour parenting class per a stipulation with the District Attorney, and ordered to pay \$1,972 in fines and fees, and ordered to pay restitution.

SECOND CAUSE FOR DISCIPLINE

(January 29, 2009 Criminal Conviction for Driving With Blood Alcohol Level of 0.08% of More on December 7, 2008)

19. Respondent is subject to disciplinary action under Code sections 490 and 2761, subdivision (f), in that Respondent was convicted of a crime that is substantially related to the qualifications, functions, and duties of a registered nurse. The circumstances are as follows:

20. On or about January 22, 2009, in the Superior Court of California, County of San Diego, Case No. M-068655, in the case entitled *People v. Kirsten Lee Gagliardo*, Respondent was convicted, on her plea of nolo contendere, of violating Vehicle Code section 23152(b) (driving with a blood alcohol level of 0.08% or more), a misdemeanor.

1 21. The facts that led to the conviction are that on or about December 7, 2008, San Diego
2 Police Department officers responded to a radio call regarding a hit and run collision at 11692
3 Ramsdell Court, San Diego, California. Upon arrival, some of the officers made contact with the
4 reporting party (RP), who informed officers that he was inside his house when he heard what
5 sounded like a car crash in the distance. A minute later, the RP heard a second crash that was
6 much louder and sounded closer. When he went outside, he observed Respondent had hit a parked
7 truck and started to drive away. RP told his wife to call the police and RP followed Respondent,
8 who turned down Brookville Drive and stopped on the right shoulder. RP approached
9 Respondent and talked to her until police arrived.

10 22. Other officers made contact with Respondent and asked her to step out of her vehicle
11 and onto the sidewalk. Once Respondent was on the sidewalk, officers could smell an odor of an
12 alcoholic beverage on her breath. Respondent was wearing a blue sweater with a zipper up the
13 front, with nothing underneath the sweater and the zipper completely unzipped, and Respondent
14 was clutching her sweater around her to avoid exposing herself. Officers assisted Respondent and
15 zipped up her sweater before officers performed field sobriety tests, which Respondent failed the
16 portions performed. The field sobriety tests had to be stopped because Respondent was unable to
17 continue, as she told officers she was too tired and had to sit down. Officers placed Respondent
18 under arrest and was transported the police station for a blood draw. Respondent's BAC was
19 analyzed at 0.19%.

20 23. As a result of the above conviction, Respondent was placed on five years summary
21 probation, ordered to serve 96 hours in the county jail, with 24 hours credit for time served,
22 ordered to pay various fines and fees, serve 10 days in the Public Service Program, ordered to
23 enroll and complete the Multiple Conviction Program, ordered to continue attending AA meetings
24 four times per week concurrent with Case No. M0610338 (see First Cause for Discipline),
25 ordered to participate in MADD and STAR as directed by the Assessor, not to drive without a
26 valid license and liability insurance, and ordered to pay restitution.

27 ///

28 ///

1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Use of Drugs and/or Alcohol in a Manner Dangerous or Injurious to Oneself or the Public)**

3 25. Respondent is subject to disciplinary action under Code section 2762, subdivision (b),
4 in that Respondent used alcohol to an extent or in a manner dangerous or injurious to herself or
5 the public, as is more fully detailed in paragraphs 15-23, which are incorporated here by
6 reference.

7 **FOURTH CAUSE FOR DISCIPLINE**

8 **(Conviction for Alcohol Related Crimes)**

9 26. Respondent is subject to disciplinary action under Code section 2762, subdivision (c),
10 in that Respondent was convicted of a criminal offenses involving the consumption of alcohol, as
11 is more fully detailed in paragraphs 15-23, which are incorporated here by reference.

12 **PRAYER**

13 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
14 and that following the hearing, the Board of Registered Nursing issue a decision:

15 1. Revoking or suspending Registered Nurse License Number 444561, issued to Kirsten
16 Lee Gagliardo, aka Kirsten Lee Lunneberg;

17 2. Ordering Kirsten Lee Gagliardo, aka Kirsten Lee Lunneberg, to pay the Board of
18 Registered Nursing the reasonable costs of the investigation and enforcement of this case,
19 pursuant to Business and Professions Code section 125.3;

20 3. Taking such other and further action as deemed necessary and proper.

21 DATED: _____

12/15/10

22 *Louise R. Bailey*
LOUISE R. BAILEY, M.ED., RN
23 ~~Interim~~ Executive Officer
Board of Registered Nursing
24 Department of Consumer Affairs
State of California
25 Complainant

26 SD2010702165
27 70397025
28